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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL LEE BROWN, Defendant and Appellant.	A158558 (Mendocino County Super. Ct. No. SCTMCRCR-18-93679)

Defendant Michael Lee Brown appeals from the trial court's sentencing order after he pleaded no contest to one count of lewd and lascivious act on a child under 14. (Pen. Code,[1] § 288, subd. (a).) Brown's appointed counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), identifying no issues and requesting that this court review the record and determine whether any arguable issue exists on appeal. Having done so, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In March 2018, the Mendocino County District Attorney filed a criminal complaint alleging that Brown had committed a felony lewd and lascivious act on a child under 14 (§ 288, subd. (a), count one) and felony continuous sexual abuse of a child (§ 288.5, subd. (a), count two). Facts

[1] Statutory references are to the Penal Code unless otherwise specified.

supporting the allegations in the complaint were elicited at the May 2018 preliminary hearing in the matter. H.H. (mother) testified that she and her five-year-old daughter, N.H., moved into Brown's one-bedroom apartment in October 2017. Mother described Brown as her "cousin" and stated she and N.H. would sleep on a mattress in the living room from Monday through Thursday. On the weekends, however, N.H. would sleep with Brown in his bedroom. According to mother, she entered Brown's bedroom on Saturday, March 17, 2018, to retrieve her phone from her daughter and discovered N.H. was not wearing her underwear or pajama pants. When she asked her daughter why, N.H. responded: "Because cousin pulled them off and he touched me."

The investigating officer testified regarding the forensic interview of N.H., which was conducted by child welfare. During the interview, N.H. described Brown touching or tickling her on her " 'pee hole,' " while pointing to her vagina. N.H. further stated that it " 'didn't hurt' " and it would happen whenever she stayed in Brown's room. At the conclusion of the hearing, the court found sufficient evidence to hold Brown to answer on both counts.

In April 2019, Brown pleaded no contest to count one and count two was dismissed with a *Harvey* waiver.[2] The plea was open to the court with the understanding that the maximum term would be eight years and the maximum fines $10,000. Brown initialed and signed a written plea waiver form, and the court queried Brown regarding his understanding of the rights he was giving up by entering a negotiated plea. Brown was advised that the offense was a violent felony and a strike, that he was subject to a lifetime firearms ban, that his conduct credits would be limited to 15 percent, and that he would be subject to lifetime sex-offender registration. The

[2] See *People v. Harvey* (1979) 25 Cal.3d 754, 758.

preliminary hearing transcript provided the factual basis for the plea. The court found Brown's plea knowing and voluntary and appointed Dr. Kevin Kelly to do a psychological evaluation of Brown prior to sentencing pursuant to section 288.1.

While sentencing was pending, Brown provided his understanding of the facts underlying the offense both to the probation department and to Dr. Kelly. According to Brown, mother dated Brown's uncle and he had known N.H. since she was a few weeks old. Brown, who described himself as an alcoholic, stated he agreed to let N.H. and mother move in for a short time because they were at risk of becoming homeless. This living arrangement was stressful for him, however, and led to him drinking more than usual. Brown claimed that he had passed out from drinking on the night in question and did not remember what had happened.

Dr. Kelly filed a report in July 2019, concluding that Brown was not diagnosable under pedophilia. However, Brown had a set of personality traits—including codependency, avoidance, alcoholism, anxiety, and overwork—which made him "vulnerable to inappropriate behavior and violation of interpersonal sexual boundaries with a child." Dr. Kelly suggested a treatment plan and opined that Brown would be likely to complete a period of probation successfully. He did not see any warning signs suggesting that Brown might be a risk to the community while in treatment. Probation also assessed Brown's risk of reoffense as low—3.9 percent over five years under the Static-99R. Nevertheless, probation recommended a midterm prison commitment of six years for Brown based on the seriousness of the offense and the significant, and likely long-term, emotional impact on the very young victim.

At the sentencing hearing on September 9, 2019, the trial court indicated that it had reviewed probation's report and recommendation, letters submitted by the victim's family, letters submitted in support of Brown, the defense's statement in mitigation, and Dr. Kelly's report. Mother made a statement, describing the impact of the crime on her daughter and requesting that Brown be sentenced to the maximum time in prison. The prosecution argued in favor of the six-year midterm recommended by probation. Defense counsel, in contrast, emphasized the "unique and mitigating" factors in the case in arguing that a grant of probation was appropriate. Brown, for instance, had no prior history of sexual offense, only a minor history of prior DUI arrests, stable employment for 30 years, stable housing, and supportive family and friends. The unusual confluence of circumstances in the case were unlikely to recur and Brown had shown his ability to follow rules and cooperate with probation. Finally, Dr. Kelly's report indicated a low risk of reoffense and a likelihood that Brown would be successful on probation.

The trial court considered the "unusual" facts and circumstances in the case and discussed Dr. Kelly's report at length in finding probation inappropriate, largely due to the seriousness of the sexual violation against a five-year-old child by an individual occupying a position of trust. While the court indicated that it was "struggling with" whether to impose the mitigated term or the midterm, in the end it followed probation's recommendation and sentenced Brown to a six-year prison term. The court additionally imposed a restitution fine of $1,800, along with a corresponding suspended parole revocation fine (§§ 1202.4, subd. (b), 1202.45, subd. (a)); criminal conviction and court security fees of $30 and $40, respectively (Gov. Code, § 70373; Pen.

Code, § 1465.8); and a $300 fine pursuant to section 290.3. Brown filed a timely notice of appeal, limited to sentencing issues.

DISCUSSION

As stated above, Brown appealed from the trial court's September 2019 sentencing order made after he entered an open plea to a single count of lewd and lascivious act on a child under 14. (§ 288, subd. (a).) We appointed counsel to represent him. After examining the record, counsel filed a *Wende* brief raising no issues on appeal and requesting that we independently review the record. (*Wende, supra*, 25 Cal.3d at p. 441; see *People v. Kelley* (2006) 40 Cal.4th 106, 109–110.) Brown was advised by his attorney of the opportunity to file a supplemental brief with this court, but he has not done so.

We have examined the entire record and are satisfied that Brown's attorney has complied with her responsibilities and that no arguable issue exists. Brown was properly advised before entering his no contest plea and stipulating to the factual basis for the plea. While the record might have supported a lesser sentence, the six-year sentence was consistent with the open plea agreement and represents a permissible exercise of the court's discretion under all of the facts and circumstances of the case, especially given the very young age of the victim. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847 [reviewing sentencing decision, which must be based on " 'individualized consideration of the offense, the offender, and the public interest,' " for abuse of discretion]; see *People v. King* (2010) 183 Cal.App.4th 1281, 1323 ["The trial court has broad discretion with regard to sentencing, and its decision will be affirmed on appeal, so long as it is not arbitrary or irrational and is supported by any reasonable inferences from the record."].)

In addition, we see no issues with respect to the fines and fees imposed by the court, to which counsel did not object.

DISPOSITION

The judgment is affirmed.

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Sanchez, J.

WE CONCUR:

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Humes, P.J.

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Margulies, J.

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